Office Supreme Court, U.S.
FILED
OCT 16 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 526, October Term, 1969

JOAN SHERIDAN O'LEARY, ET AL — APPELLANTS

v.

COMMONWEALTH OF KENTUCKY — APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF KENTUCKY

MOTION TO DISMISS AND/OR AFFIRM
AND BRIEF IN SUPPORT

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

GEORGE F. BABE
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR APPELLEE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions Presented	1-2
Statement	2-5
Summary of Argument	6
Argument	6-12
I. THERE IS NO APPELLATE JURISDICTION AS THE LAW CHALLENGED IS COMMON LAW, AND NOT A STATUTE WITHIN THE MEANING OF 28 U.S.C. §1257 (2).	6-7
II. THE CLAIM OF TOTAL ABSENCE OF EVIDENCE TO SUPPORT THE CONVICTIONS WAS NEITHER RAISED NOR DECIDED IN THE STATE COURTS AND IS NOT PROPERLY BEFORE THIS COURT.	7-8
III. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.	8-12
(1) APPELLANTS MAY NOT CHALLENGE THE COMMON LAW OFFENSE FOR OVERBREADTH; IT IS NEITHER VAGUE NOR OVERLY BROAD.	8-11
(2) APPELLANTS HAVE NOT BEEN CONVICTED FOR ENGAGING IN PROTECTED ACTS OF EXPRESSION.	12
(3) THERE IS UNCONTESTED EVIDENCE OF SUBSTANCE TO SUPPORT THE CONVICTIONS OF APPELLANTS.	12
CONCLUSION	13

CITATIONS

Cases:	
Adderly v. Florida 385 U.S. 39 (1966)	12
Ashton v. Commonwealth Ky., 405 S.W. 2d 562 (1965), reversed on other grounds, 384 U.S. 195 (1966)	11

Barber v. Kinsella
277 F. Supp. 72 (D. Conn. 1967) 10

Cameron v. Johnson
390 U.S. 611 (1968) 11

Cantwell v. Connecticut
310 U.S. 296 (1940) 7

Chaplinsky v. New Hampshire
315 U. S. 568 (1942) 12

Commonwealth v. Donoghue
250 Ky. 343, 63 S.W. 2d 3 (1933) 9

Delk v. Commonwealth
166 Ky. 39, 178 S.W. 1129 (1915) 6

Dombrowski v. Pfister
380 U.S. 479 (1965) 9

Edelman v. California
344 U.S. 357 (1953) 7

Feiner v. New York
340 U. S. 315 (1951) 12

Heard v. Rizzo
281 F. Supp. 720 (E. D. Pa. 1968)
Affirmed, 392 U. S. 646 10

King Mfg. Co. v. Augusta
277 U.S. 100 (1928) 7

Lynch v. State 2 Md. App. 546, 236 A. 2d 45 (1967),
Cert. denied, 393 U.S. 915 11

Maxwell v. Newbold
59 U.S. 511 (1856) 7

O'Leary v. Commonwealth
Ky., 441 S.W. 2d 150 (1969) 1, 5, 6, 9; 10

State v. Boles
5 Conn. Cir. 22, 240 A. 2d 920 (1967) 10

State v. Dorsey
4 Conn. Cir 476, 235 A. 2d 859 (1967) 10

Thompson v. Louisville
362 U.S. 199, 205-6 (1960) 12

Thornhill v. Alabama
310 U.S. 88, 96-7 (1940) 9

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions Presented	1-2
Statement	2-5
Summary of Argument	6
Argument	6-12
I. THERE IS NO APPELLATE JURISDICTION AS THE LAW CHALLENGED IS COMMON LAW, AND NOT A STATUTE WITHIN THE MEANING OF 28 U.S.C. §1257 (2).	6-7
II. THE CLAIM OF TOTAL ABSENCE OF EVIDENCE TO SUPPORT THE CONVICTIONS WAS NEITHER RAISED NOR DECIDED IN THE STATE COURTS AND IS NOT PROPERLY BEFORE THIS COURT.	7-8
III. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.	8-12
(1) APPELLANTS MAY NOT CHALLENGE THE COMMON LAW OFFENSE FOR OVERBREADTH; IT IS NEITHER VAGUE NOR OVERLY BROAD.	8-11
(2) APPELLANTS HAVE NOT BEEN CONVICTED FOR ENGAGING IN PROTECTED ACTS OF EXPRESSION.	12
(3) THERE IS UNCONTESTED EVIDENCE OF SUBSTANCE TO SUPPORT THE CONVICTIONS OF APPELLANTS.	12
CONCLUSION	13

CITATIONS

Cases:	
Adderly v. Florida 385 U.S. 39 (1966)	12
Ashton v. Commonwealth Ky., 405 S.W.2d 562 (1965), reversed on other grounds, 384 U.S. 195 (1966)	11

Barber v. Kinsella
277 F. Supp. 72 (D. Conn. 1967) ---------- 10

Cameron v. Johnson
390 U.S. 611 (1968) ---------- 11

Cantwell v. Connecticut
310 U.S. 296 (1940) ---------- 7

Chaplinsky v. New Hampshire
315 U. S. 568 (1942) ---------- 12

Commonwealth v. Donoghue
250 Ky. 343, 63 S.W. 2d 3 (1933) ---------- 9

Delk v. Commonwealth
166 Ky. 39, 178 S.W. 1129 (1915) ---------- 6

Dombrowski v. Pfister
380 U.S. 479 (1965) ---------- 9

Edelman v. California
344 U.S. 357 (1953) ---------- 7

Feiner v. New York
340 U. S. 315 (1951) ---------- 12

Heard v. Rizzo
281 F. Supp. 720 (E. D. Pa. 1968)
Affirmed, 392 U. S. 646 ---------- 10

King Mfg. Co. v. Augusta
277 U.S. 100 (1928) ---------- 7

Lynch v. State 2 Md. App. 546, 236 A. 2d 45 (1967),
Cert. denied, 393 U.S. 915 ---------- 11

Maxwell v. Newbold
59 U.S. 511 (1856) ---------- 7

O'Leary v. Commonwealth
Ky., 441 S.W. 2d 150 (1969) ---------- 1, 5, 6, 9, 10

State v. Boles
5 Conn. Cir. 22, 240 A. 2d 920 (1967) ---------- 10

State v. Dorsey
4 Conn. Cir 476, 235 A. 2d 859 (1967) ---------- 10

Thompson v. Louisville
362 U.S. 199, 205-6 (1960) ---------- 12

Thornhill v. Alabama
310 U.S. 88, 96-7 (1940) ---------- 9

Tinker v. Des Moines Community School District
393 U.S. 503, 21 L.ed. 2d 731, at 742 (1969) ---------- 12

United States v. Jones
244 F. Supp. 181 (S.D.N.Y. 1965), affirmed,
365 F. 2d 675 ---------- 10

United States v. National Dairy Prod. Corp.
372 U.S. 29 (1963) ---------- 9, 11

United States v. O'Brien
391 U.S. 367 (1968) ---------- 12

United States v. Raines
362 U.S. 17, 21 (1960) ---------- 9

United States v. Woodard
376 F. 2d 136 (7th Cir. 1967) (Illinois) ---------- 10, 11

West v. Commonwealth
208 Ky. 735, 271 S.W. 1079 (1925) ---------- 11

Wilson v. Commonwealth
290 Ky. 223, 160 S.W. 2d 649 (1942) ---------- 9

Statutes:

Kentucky Revised Statute 437.010 ---------- 6, 7

28 U.S.C. § 1257(2) ---------- 1, 6, 7

Miscellaneous:

Annotations, 84, L.ed. 925, 927 (1940) ---------- 7

Annotation, 100 L.ed. 1200 (1956) ---------- 7

Annotation, 16 L.ed. 2d 1065 (1967) ---------- 11

Annotation, 16 L. ed. 2d 1241 (1967) ---------- 11

IN THE

Supreme Court of the United States

No. 526, October Term, 1969

DAN SHERIDAN O'LEARY, III, ET AL.----------*Appellants*

V.

COMMONWEALTH OF KENTUCKY ----------*Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that this appeal be dismissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this motion states:

1. The appeal is not properly taken in conformity to the statute governing the appellate jurisdiction of this Court because the appeal does not involve a statute of the State within the meaning of 28 U.S.C. § 1257 (2).

2. The contention that the convictions are so devoid of evidentiary support as to constitute a denial of due process was neither raised nor decided in the state courts.

3. All three questions presented by appellants are not substantial Federal questions under the circumstances of this case. Appellants were not engaging in protected conduct and may not rely on the theory of overbreadth.

4. Brief in support of these motions is filed herewith pursuant to Rule 35.

Respectfully submitted,
JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

GEORGE F. RABE
ASSISTANT ATTORNEY GENERAL
Capitol Building, Frankfort, Ky. 40601
COUNSEL FOR APPELLEE

IN THE

Supreme Court of the United States

No. 526, October Term, 1969

DAN SHERIDAN O'LEARY, III, ET AL.----------*Appellants*

V.

COMMONWEALTH OF KENTUCKY ----------*Appellee*

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969).

JURISDICTION

Appellee contends appellants improperly invoke the appellate jurisdiction of this Court under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

I.

Whether the upholding of a state common law offense, the punishment of which is prescribed by statute, as against constitutional objections, presents a case within the appellate jurisdiction of this Court.

II.

Whether this Court has jurisdiction over the question of absence of any evidence to convict, the question not having been raised or decided in state courts.

III.

Whether in this case, in which appellants were convicted of the Kentucky common law offense of breach of peace for willfully and intentionally blocking doorways to an office of the University of Kentucky, the questions of (1) vagueness and overbreadth of the law, (2) unconstitutionality of application of breach of peace law to facts of this case on freedom of speech grounds, and (3) absence of evidence to support conviction, are substantial.

STATEMENT

The four appellants were convicted, after trial by jury, of the Kentucky common law offense of breach of peace, and fined $75.00 each. (Transcript of Record, hereafter TR, pp. 7, 8). The circumstances giving rise to these appeals follow.

On November 6, 1967, the four appellants, who were students, participated in a demonstration protesting against the Defense Intelligence Agency which was recruiting on the University of Kentucky campus. (Transcript of Evidence, hereafter TE, pp. 4-11). The demonstration took place in the hallway outside the Placement Service offices (where the recruiting activities were taking place) on the second floor of the Old Agricultural Building on the campus (TE 4).

Between 9:30 A.M. and 10:00 A.M. that morning, Associate Dean of Students Jack Hall met with the group of student protestors and established certain ground rules which were: (1) peaceful picketing would be permitted; (2) noise would have to be maintained at a level where all could operate; and (3) access would have to be available to the people going to Placement Services rooms. (TE 6).

At one point during the morning one of the appellants, Khristina Lewis, lay prone on the floor directly in front of the entrance into an alcove containing three offices used by the Defense In-

telligence Agency (TE 5-7), and it was necessary for those entering the alcove to step over her (TE 36). Two of the appellants, Woock and Lewis, prevented a secretary of the Placement Service from entering one of the offices in the alcove. After a request by Associate Dean of Students Jack Hall, they let her pass (TE 21). The interest of "the people in the door . . . was not in blocking her, so they stated, but in blocking the Defense Intelligence Agency." (TE 21). On at least one occasion there "was some profanity used," although this was not specifically attributed to any of the appellants. (TE 35).

The group grew from approximately 5 students at 9:30 A.M. (TE 4) to approximately 17 students and 5 members of the press by 1:00 P.M. (TE 30). Between 1:00 and 1:30 P.M., Dean Hall advised the demonstrators that a point had been reached where they were constituting an interference and interruption of the University Placement Service activities, and asked them to remove themselves either to the general or public lobby area on the first floor or to the outside of the building, either place they chose. (TE 30, 31). The press and all of the demonstrators except the four appellants left the second floor, but the appellants continued to stand in the entrance to the alcove leading to the offices. (TE 8, 9). When Dean Hall again asked them to leave, appellants moved inside the small alcove and sat down, blocking doorways to two rooms that were to be used at 1:30 that afternoon by the Defense Intelligence Agency. He then called the University Police and asked them that they request appellants to leave the second floor. (TE 8, 9, 46).

The testimony of Sergeant Best of the University Police describes what occurred when the officers arrived:

"D10 All right, sir, and what took place after you arrived?

A. Well, I asked them twice, on two different occasions while I was up there if they would get up and get outside or get up and move, and I asked them once and they refused, and I asked them

twice, and then I advised them if they didn't, I would have to arrest them and charge them with breach of the peace, and that's what I done.

D11 On either occasion that you asked them to leave did they make any response to you?

A. No, sir. They didn't get up, no sir.

D12 Well, did they answer you? Did they say anything to you?

A. They just wouldn't get up. I don't recall saying, but they wouldn't get up.

D13 Now, were you by yourself on this occasion?

A. No, sir, there was Sgt. Curtis with me.

D14 And where did you take them after placing them under arrest?

A. We carried them down the steps and put them in the cruiser, and they was taken to city police station, lockup.

D15 Now, you say you carried them down the steps?

A. Yes, sir.

D16 Describe how this was done and for what reason?

A. Well, like I say, they . . .

MR. SLEDD: Objection,

THE COURT: Overruled.

D17 Go ahead and answer.

A. We asked them, when they wouldn't get up, we asked them, and when they wouldn't we got them under each arm, me and Sgt. Curtis, and carried them down the steps one at a time and put them in the cruiser.

D18 Was that all four of them that this happened with reference to?

A. Yes, sir. I don't think that I carried—I think Capt. Sloan and somebody carried the lady down, but we carried the three boys down." (TE 38-40)

Appellants were convicted of breach of peace in the Lexington Police Court. (TR 2). They appealed to the Fayette Circuit Court for a trial de novo before a jury. (TR 1-7). At the conclusion of the evidence summarized above, the trial court instructed on breach of peace as follows:

"INSTRUCTION NO. 1

If the jury believe from the evidence in this case beyond a reasonable doubt that the defendants, Khristina Lewis, Dan Sheridan O'Leary, William Murrell and Roger A. Woock, in Fayette County, Kentucky, and within 12 months next before the issuance of the warrant herein, did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky, by blocking the entrance to the Placement Service, you will find the defendants guilty as charged in the warrant and fix their punishment at a fine of not more than one hundred dollars or by imprisonment in the county jail for not less than five nor more than 30 days, or by both such fine and imprisonment in your discretion.

INSTRUCTION No. 2

A 'breach of the peace' is a violation of public order or decorum, the offense of disturbing the public peace. By 'peace' is meant the tranquility and joy by the citizens of the community where good order reigns among its members." (TE 69, 70).

The jury found appellants guilty of breach of peace and fined each $75.00. Judgment was entered accordingly, the Kentucky Court of Appeals affirmed, *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969), and these appeals followed.

SUMMARY OF ARGUMENT

This case is not within the appellate jurisdiction of this Court because the law appellants challenge constitutionally is not statutory but common law.

The contention that the convictions are so devoid of evidentiary support as to constitute a denial of due process was neither raised nor decided in the state courts; there is such an abundance of evidence as to render that question unsubstantial.

All three questions presented, constitutionality of the law on its face, constitutionality as applied, and evidence to convict, are not substantial Federal questions under the circumstances of this case. Appellants were not engaging in protected conduct and may not challenge the law for overbreadth; it is not overly broad anyway.

ARGUMENT

I.

THERE IS NO APPELLATE JURISDICTION AS THE LAW CHALLENGED IS COMMON LAW, AND NOT A STATUTE WITHIN THE MEANING OF 28 U.S.C. § 1257 (2).

Kentucky Revised Statute 437.010 (now repealed, Kentucky Acts, 1968, c. 103, § 3) simply provides:

> "Any person who is guilty of a breach of the peace, riot, rout, unlawful assembly or affray shall be fined not more than one hundred dollars or imprisoned for not less than five nor more than fifty days, or both."

Thus, breach of peace is not a statutory offense in Kentucky; it is a common law offense, the punishment for which is prescribed by statute. *O'Leary v. Commonwealth*, Ky., 441 S.W. 2d 150 (1969); *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915).

The phrase "statute of any state" in what is now 28 U.S.C.

§ 1257 (2), conferring appellate jurisdiction, has been broadly construed by this Court, and includes statutes, municipal ordinances, and administrative enactments. See *King Mfg. Co. v. Augusta*, 277 U.S. 100 (1928), and cases cited therein. However, no case has come to our attention where a common law offense was considered to be included. On the other hand, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court, while exercising appellate jurisdiction over a conviction under a state statute, considered a concurrent attack on the Connecticut common law offense of inciting a breach of the peace as coming within the certiorari jurisdiction of the Court. 310 U.S. at 300, 301.

Kentucky Revised Statute 437.010 merely prescribes the maximum penalty for breach of peace and several other common law offenses. Since the penalty is not attacked, and the offense is defined by Kentucky common law, there is no basis for exercise of the appellate jurisdiction of this Court.

II.

THE CLAIM OF TOTAL ABSENCE OF EVIDENCE TO SUPPORT THE CONVICTIONS WAS NEITHER RAISED NOR DECIDED IN THE STATE COURTS AND IS NOT PROPERLY BEFORE THIS COURT.

In the trial court, appellants simply moved for a directed verdict on the ground the Commonwealth "failed to prove the necessary elements to make out the offense as charged." (TE 68-9). We find nothing in the brief of appellants in the Kentucky Court of Appeals or in the opinion indicating the claim of absolute absence of evidence to convict was raised or decided. Accordingly, the point is not properly before this Court for decision. *Edelman v. California*, 344 U.S. 357 (1953); *Maxwell v. Newbold*, 59 U.S. 511 (1856); Annotations, 84 L.ed. 925, 927 (1940), and 100 L.ed. 1200 (1956).

We should note, however, that in any event we have difficulty distinguishing this point, as it is presented by appellants.

from the claim that the application of the common law offense to the facts of this case is unconstitutional.

III.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

(1) APPELLANTS MAY NOT CHALLENGE THE COMMON LAW OFFENSE FOR OVERBREADTH; IT IS NEITHER VAGUE NOR OVERLY BROAD.

We believe it appropriate at this point to recap the facts upon which the United States Constitution is to be brought to bear. When politely requested to remove to another part of the building or outside, appellants entrenched themselves in the small alcove leading to the University Placement Service, and sat down, blocking two doorways. The campus police were called, and they twice asked appellants to move, expressly stating they would otherwise have to arrest appellants for breach of the peace. Appellants adamantly remained to carry out their avowed purpose of blocking the Agency. They were not satisfied to demonstrate and disseminate their ideas as they were permitted to do. Instead they chose to carry them into effect through the forceful means of blocking ingress and egress of law abiding persons who had a right to come and go in accordance with their own ideas. It is difficult to conceive of a more flagrant violation of the peace. And no question of actual notice is presented because appellants were expressly told they were to be arrested and what for.

Appellants were convicted *not* because they were engaging in speech or disseminating ideas, but because the jury found beyond a reasonable doubt they "did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky, by blocking the entrance to the

Placement Service." (This Brief, p. 5). And, as indicated below, the law under which they were convicted was not one regulating the dissemination of ideas, but rather the common law offense of breach of the peace. Under these circumstances, we do not believe the occasion is presented for this Court to consider the claim of overbreadth. See the discussions in *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. National Dairy Prod. Corp.*, 372 U.S. 29 (1963); *Thornhill v. Alabama*, 310 U.S. 88, 96-7 (1940). We believe this case rather is occasion for application of the rule that a person to whom application of a law is constitutional will not be heard to attack it on the ground that it may be taken as applying to other persons or other situations. *United States v. Raines*, 362 U.S. 17, 21 (1960).

Nevertheless, we believe the law is neither overly broad nor vague. In Kentucky, the common law exists *only* insofar as modified by the Constitution, the Legislature, and judicial decisions. *Wilson v. Commonwealth*, 290 Ky. 223, 160 S.W. 2d 649 (1942); *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W .2d 3 (1933). As indicated in the opinion of the Court below:

> "'The term "breach of peace" is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment.' *King v. Commonwealth*, 32 KLR 79, 80, 105 SW 419 (1907). To paraphrase the last portion of this quotation, conduct that is calculated to incite violence is a breach of peace. 'It includes not only violent acts but acts and words likely to produce violence in others.' *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.ed. 1213 (1940). However, *the literal breadth of the definition does not mean, and in this jurisdiction never has been construed to mean, that lawful and proper conduct may constitute a breach of peace just because it provokes violence or disorder. To the contrary, it was*

> *explicity recognized* in *West v. Commonwealth*, 208 Ky. 735, 271 SW 1079, 1081 (1925), *that the lawful exercise of a constitutional right* (the right of assembly) *cannot be a breach of peace.* We therefore do not feel that the law against breach of peace, as it has been thus construed in Kentucky, is so vague or overly broad in scope as to pose any threat to the rights of free speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. Cf. *Cox v. Louisiana*, 379 U.S. 536, 551, 85 S. Ct. 453, 13 L.ed. 2d 471 (1965). Indeed, it occurs to us that if there is any uncertainty in this context, it is not because the tried and settled law of breach of peace is vague, but because the burgeoning scope of the constitutional protections has become so." (441 S.W. 2d at 154, Brief for Appellant in this Court, p. 33.) (Emphasis added.)

We have been unable to find any case in which the common law offense of breach of peace as narrowly circumscribed by the Kentucky Court of Appeals has been declared unconstitutional. On the contrary, similar laws in the States of Connecticut, Illinois, New York, and Pennsylvania have been upheld in recent years, with due consideration of the opinions of this Court, against attacks such as that which appellants make. See *United States v. Woodard*, 376 F. 2d 136 (7th Cir. 1967) (Illinois); *Heard v. Rizzo*, 281 F. Supp. 720 (E.D.Pa. 1968), affirmed, 392 U.S. 646; *Barber v. Kinsella*, 277 F.Supp. 72 (D. Conn. 1967); *State v. Boles* 5 Conn. Cir. 22, 240 A.2d 920 (1967); *State v. Dorsey*, 4 Conn. Cir. 476, 235 A.2d 859 (1967) (cited only as indicating Connecticut offense is similar to ours); *United States v. Jones*, 244 F.Supp. 181 (S.D.N.Y. 1965), affirmed, 365 F.2d 675 (2d Cir. 1966). The discussions in those cases consider at great length the type contentions advanced by appellants, and reject them after careful consideration of the opinions of this Court in the light of laws not materially different from that involved in this case. We think they fairly demonstrate that, without exception, courts have considered the offence involved in this case as valid on its face.

With particular reference to the claim of vagueness, the court noted in *United States v. Woodard* that the term "breach of peace" has received a "fairly well defined gloss." In addition, see *Lynch v. State*, 2 Md App. 546, 236 A.2d 45 (1967), cert. denied, 393 U.S. 915.

Appellants contend *West v. Commonwealth*, 208 Ky. 735, 271 S.W. 1079 (1925), indicates constitutionally protected conduct can constitute a breach of the peace in Kentucky. (Brief for Appellants, p. 15). On the contrary, the holding in that case was exactly the opposite. We see no point in arguing what the result would be on the same facts today. Courts, including this one, continually decide cases in accordance with changes in the circumstances of our society. The significant aspect of the *West* case is that it clearly shows Kentucky's common law offense, as has always been the case, does not prsocribe constitutionally protected conduct. In a similar way, *Ashton v. Commonwealth*, Ky., 405 S.W. 2d 562 (1965) (dictum), reversed on other grounds, 384 U.S. 195 (1966), shows that the common law offense has been narrowed in Kentucky to comport with the Constitution.

The holding of the Kentucky Court of Appeals is not at all inconsistent with decisions of this Court. We will not undertake to discuss in detail the myriad cases in which this Court has struck down attempts by states to regulate or prohibit constitutionally protected conduct under the guise of breach of the peace or other laws overly broad in scope. We think it sufficient to state that in none of those cases did this Court indicate that a similar law, narrowly construed as Kentucky's is, is either vague or overly broad. Generally, the cases deal with laws construed to prohibit peaceful demonstrations and religious dissemination. See Annotations, 16 L.ed. 2d 1065 (1967), supplementing 93 L.ed. 1165, 2 L.ed. 2d 1715, 11 L.ed. 2d 1137; 16 L.ed. 2d 1241 (1967). In short, we think Kentucky's law fairly gives notice of what it prohibits, and does not import prohibition of constitutionally protected conduct. Cf. *United States v. National Dairly Prod Corp.*, supra; *Cameron v. Johnson*, 390 U.S. 611 (1968).

(2) APPELLANTS HAVE NOT BEEN CONVICTED FOR ENGAGING IN PROTECTED ACTS OF EXPRESSION.

Appellants do not deny the evidence shows they sat down in doorways to public offices blocking entrance thereto. (Brief for Appellants, pp. 5, 16). We have previously demonstrated that the jury were limited by the instructions to consideration only of the blocking of the door ways in determining the guilt or innocence of appellants. It is clear this conduct is not protected by the United States Constitution. Cf. *United States v. O'Brien*, 391 U.S. 367 (1968); *Adderly v. Florida*, 385 U.S. 39 (1966); *Feiner v. New York*, 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For a delineation between undisruptive, protected conduct at a school and the converse, see *Tinker v. Des Moines Community School District*, 393 U.S. 503, 21 L.ed. 2d 731, at 742, (1969).

(3) THERE IS UNCONTESTED EVIDENCE OF SUBSTANCE TO SUPPORT THE CONVICTIONS OF APPELLANTS.

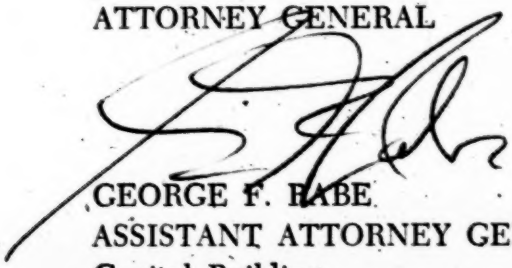
We think the concession noted above that appellants sat down blocking doorways to public offices disposes of their contention that there is no evidence whatsoever to support their convictions. The discussions in the *O'Brien*, *Adderly*, and *Tinker* cases so indicate. Unlike the petitioner in *Thompson v. Louisville*, 362 U.S. 199, 205-6 (1960), appellants did engage in conduct "likely . . . to adversely affect the good order and tranquillity" of the community.

CONCLUSION

Appellants were fairly convicted after a trial by jury with carefully limiting instructions under a law which fairly gave notice their conduct was prohibited. No question of substance is presented for the consideration of this Court and this appeal should be dismissed or the judgment of the Court of Appeals of Kentucky affirmed.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL



GEORGE F. RABE
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUSEL FOR APPELLEE

DATED: October 10, 1969